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# The Intersection of Louisiana Succession Law and Mineral Code Article 190: Quantum Resources v. Pirate Lake Oil

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**The Intersection of Louisiana Succession Law and  
Mineral Code Article 190: *Quantum Resources v.  
Pirate Lake Oil***

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## INTRODUCTION

Oil is black gold<sup>1</sup>—where there is oil, there is money to be made. Louisiana holds close to 10% of the nation's oil reserves, and its reserves of other minerals, such as natural gas, are even more significant.<sup>2</sup> Not surprisingly, the ownership of mineral rights is frequently litigated in Louisiana, often involving family members at war, fighting for the right to claim lucrative mineral rights.<sup>3</sup> To avoid family turmoil, a mineral rights owner may choose to prepare a last will and testament to ensure that, upon his death, the rights are given to the intended beneficiary. Although deference to a testator's intent is a fundamental principle of Louisiana succession law,<sup>4</sup> recent jurisprudence interpreting the inception and classification of the surviving spouse usufruct and how it applies to Louisiana Mineral Code article 190 has produced uncertainty as to whether Louisiana courts will actually uphold a testator's final wish.<sup>5</sup>

Imagine a testator who creates a last will and testament bequeathing everything he owns to his spouse. Included in the testator's estate is a piece of immovable property located in Louisiana that is rich with oil, which could provide for his family for years to come. Unbeknownst to the testator, Louisiana recognizes a doctrine called forced heirship, which reserves for the testator's children a portion of his estate called the forced portion.<sup>6</sup> As forced heirs, his children have the right to demand their share of his estate even though the testator bequeathed all of his property to his spouse.<sup>7</sup> The children successfully move to have the testator's bequest to the spouse judicially reduced in order to satisfy their

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1. *Black Gold*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/black%20gold>, archived at <http://perma.cc/7SL6-6YB9> (last visited Jan. 23, 2014). See also Michael A. Oglie, *Black Gold: An Oil and Gas Primer for Estate Planners*, 20 OHIO PROB. L.J. 31 (2009).

2. "Louisiana contains just under 10 percent of all known U.S. oil reserves and is the country's third largest producer of petroleum. Its reserves of natural gas are even larger and it produces just over one-quarter of all U.S. supplies." INFOLOUISIANA, <http://doa.louisiana.gov/about/economy.htm>, archived at <http://perma.cc/AT6V-ZTAU> (last visited Jan. 23, 2014).

3. See *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867 (La. Ct. App. 2012); *Darby v. Rozas*, 580 So. 2d 984 (La. Ct. App. 1991).

4. See LA. CIV. CODE art. 1611 (2015); *Succession of Mydland*, 653 So. 2d 8, 11–12 (La. Ct. App. 1995).

5. See *infra* Part II.

6. See discussion *infra* Part I.A.

7. See discussion *infra* Part I.A.

forced portion.<sup>8</sup> As a result, the testator's children are recognized as the naked owners of the Louisiana property,<sup>9</sup> leaving his spouse with only a usufruct over that property<sup>10</sup>—even though the testator wished to give all of his property to his spouse.

A few years later, oil operations begin on the Louisiana property and generate hundreds of thousands of dollars in royalties. Both the testator's spouse and his children believe that they are entitled to the proceeds, the spouse as usufructuary and the children as naked owners of the land. A lawsuit is filed to determine who is legally entitled to the mineral rights. Unfortunately for the spouse, the court relies on a recent Louisiana Fifth Circuit Court of Appeal decision, which leads the court to make two erroneous determinations as to the inception and classification of the usufruct.<sup>11</sup>

First, the court holds that the spouse's usufruct was created when the trial court granted a judgment of possession, which is the stage in succession proceedings recognizing the relationship of the parties to the decedent.<sup>12</sup> Further, the court finds that the judgment of possession occurred prior to the commencement of the oil production on the property. This analysis is problematic, however, because Louisiana law is clear that a judgment of possession does not create rights—it merely recognizes inheritance rights already conferred by operation of law.<sup>13</sup> This incorrect finding as to when

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8. Reduction is the right of forced heirs to reduce excessive donations to the extent necessary to eliminate impingements on the portion that they are guaranteed. *See* LA. CIV. CODE art. 1503 (2015).

9. “The naked owner enjoys prerogatives of ownership to the extent that they do not interfere with the enjoyment of the usufructuary. Accordingly, during the existence of the usufruct, the rights of the naked owner begin where the rights of the usufructuary end.” A. N. YIANNPOULOS, PERSONAL SERVITUDES § 5:3, *in* 3 LOUISIANA CIVIL LAW TREATISE 341 (5th ed. 2011). The naked owner may also “dispose of the naked ownership, but he cannot thereby affect the usufruct.” LA. CIV. CODE art. 603 (2015).

10. A usufruct is a “real right of limited duration on the property of another.” LA. CIV. CODE art. 535 (2015). A usufructuary is entitled to the *usus* and the *fructus* over the property, but the usufructuary is not entitled to the *abusus*. Generally, this means that a usufructuary is only entitled to use and enjoy the fruits of the property but has no power to alienate the thing. *See* discussion *infra* Part I.A.

11. *See infra* Part II; *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867 (La. Ct. App. 2012).

12. *See* LA. CODE CIV. PROC. art. 3062 (2012).

13. *Id.* (“The judgment of possession rendered in a succession proceeding shall be prima facie evidence of the relationship to the deceased of the parties recognized therein, as heir, legatee, surviving spouse in community, or usufructuary, as the case may be, and of their right to the possession of the estate of the deceased.”); Ronald J. Scalise, Jr., *The Chaos and Confusion of Modern Collation: A Critical Look into an Institution of Louisiana Successions Law*, 75

the usufruct was created may have serious implications if the “open mine” doctrine is invoked to determine who is entitled to the mineral rights, as that doctrine states that a usufructuary is only entitled to the rights in mines that were “actually worked *at the time the usufruct was created*.”<sup>14</sup>

Second, the court fails to recognize the scholarly debate over the true type of usufruct that arises when a decedent leaves his entire estate to his spouse and the forced heirs exercise their right of reduction. As a result, the court holds that the spouse’s usufruct does not qualify as a “surviving spouse” usufruct under Louisiana Mineral Code article 190, an article providing special rules that govern usufructs of mineral rights.<sup>15</sup> Article 190 contains two sections with different rules that determine whether the naked owner or the usufructuary is entitled to the mineral rights: section A for usufructs other than those of a surviving spouse and section B for usufructs of a surviving spouse.<sup>16</sup>

Because the court finds that the spouse is not a “surviving spouse” under article 190, the court applies the section that subjects the spouse to the “open mine” doctrine instead of the section that grants mineral rights to the surviving spouse—regardless of whether the mine was open at the time the usufruct was created.<sup>17</sup> However, the court builds upon its prior determination that the judgment of possession created the usufruct instead of relying on Louisiana statutes and jurisprudence, which show that a spouse who is living when the decedent dies is not simply a legatee of the testator’s will but is also a “surviving spouse.”<sup>18</sup>

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TUL. L. REV. 411, 434 (2000) (“In a judgment of possession, an heir ‘acquires nothing . . . that was not already his by operation of law.’” (citation omitted)).

14. LA. REV. STAT. ANN. § 31:190(A) (2000) (emphasis added). The open mine doctrine is defined under Mineral Code article 191:

[I]f at the time a usufruct is created minerals are being produced from the land or other land unitized therewith, or if there is present on the land or other land unitized therewith, a well shown by surface production test to be capable of producing in paying quantities, the usufructuary is entitled to the use and enjoyment of the landowner’s rights in minerals as to all pools penetrated by the well or wells in question.

*Id.* § 31:191(A).

15. *Id.* § 31:190.

16. *Id.*

17. See discussion *infra* Part I.C.

18. See LA. CIV. CODE art. 890 (1989); *Morgan v. Leach*, 680 So. 2d 1381, 1383 (La. Ct. App. 1996).

As a result of the court's conclusions that the usufruct was created at the time the judgment of possession was rendered and that the open mine doctrine applies to the spouse, the testator's spouse is not entitled to receive any of the mineral proceeds. Because the judgment of possession was rendered before mineral production began, there was not an open mine at the time of the usufruct's creation; thus, the testator's children are entitled to the proceeds as the naked owners of the property. The court's flawed analysis stems from its reliance on a Louisiana Fifth Circuit Court of Appeal decision that misinterpreted the law of usufruct in the context of mineral rights, which leads to an outcome completely contrary to not only Louisiana law but also the decedent's intent.

This is exactly the troubling outcome that could occur as a result of the Louisiana Fifth Circuit Court of Appeal's faulty reasoning in *Quantum Resources v. Pirate Lake Oil*.<sup>19</sup> In *Quantum*, the court held that the judgment of possession rendered in the succession proceedings created the spouse's usufruct.<sup>20</sup> Further, the court found that the decedent's spouse was merely a legatee of the decedent's will. Even though he was, in fact, a surviving spouse, the court held that he was not a surviving spouse under Mineral Code article 190.<sup>21</sup> Thus, the court applied Mineral Code article 190(A)—the rule for non-surviving spouse usufructs that relies on the open mine doctrine—and concluded that the spouse was entitled to the mineral proceeds because drilling operations commenced before the usufruct was created.<sup>22</sup> A correct application of the law would have granted the surviving spouse the proceeds, regardless of whether there was an open mine at the time the usufruct was created.<sup>23</sup>

Although the court in *Quantum* reached the correct result despite its unsound analysis, potential mineral rights beneficiaries in future cases may not fare as well should courts apply the *Quantum* court's flawed reasoning.<sup>24</sup> The court's improper analysis highlights the importance of a usufruct's classification when mineral rights are involved—specifically, whether a usufruct is in favor of a surviving spouse and not subject to the open mine

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19. 105 So. 3d 867 (La. Ct. App. 2012).

20. *Id.* at 873–74.

21. *Id.* at 873.

22. *Id.* at 874.

23. See discussion *infra* Part IV.A.

24. The *Quantum* court ultimately concluded that the spouse was entitled to the mineral rights. *Quantum*, 105 So. 3d at 874. Thus, as discussed in Part IV.A, *infra*, the outcome was correct; however, as the hypothetical in the Introduction highlights, the analysis the court used could lead to improper results in the future.

doctrine under Louisiana Mineral Code article 190(B),<sup>25</sup> or whether a usufruct is subject to the open mine doctrine under Louisiana Mineral Code article 190(A) because it is legal or conventional.<sup>26</sup>

The *Quantum* opinion also illustrates the importance of properly classifying a usufruct that arises when forced heirs exercise their right of reduction, an issue that the *Quantum* court did not address and one that has been blurred by a complicated legislative history and substantial policy changes in Louisiana.<sup>27</sup> The answers to these complex issues have serious implications for future legatees who may be faced with circumstances similar to those presented in *Quantum*.<sup>28</sup> As one of the nation's leading oil and gas producers, it is important for Louisiana to assure landowners who bequeath property rich with minerals that their intent will be honored when they die. As a result of the court's reasoning in *Quantum*, the intent of many Louisiana testators is in jeopardy and at the mercy of the courts.

Part I of this Comment provides an overview of Louisiana law with respect to forced heirship and surviving spouse usufructs, and it also examines the legislative policies behind the enactment of Louisiana Mineral Code article 190 and the article's application to usufructs that include mineral rights. Part II discusses the facts and holding of *Quantum Resources v. Pirate Lake Oil*.<sup>29</sup> Part III analyzes the scholarly debate over the proper classification of the usufruct that a surviving spouse receives when forced heirs reduce a disposition in full ownership. Part III further provides the proper solution to this debate and discusses the solution in light of *Quantum*. Part IV then highlights the Louisiana Fifth Circuit Court of Appeal's flawed reasoning in *Quantum Resources v. Pirate Lake Oil* in classifying the spouse's usufruct and its application to Mineral Code article 190.<sup>30</sup> This Part maintains that although the court reached the correct result, the proper classification of the usufruct in this case was a surviving spouse usufruct under Mineral Code article 190(B), which states that the usufruct is not subject to

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25. See discussion *infra* Part II (defining the different types of surviving spouse usufructs); LA. REV. STAT. ANN. § 31:190 (2000).

26. "The usufruct created by juridical act is called conventional; the usufruct created by operation of law is called legal." LA. CIV. CODE art. 544 (2015).

27. See discussion *infra* Part III.

28. The mineral royalties in this case amounted to \$581,269.35. Petition in Concursus Proceeding at 15–20, *Quantum*, 105 So. 3d 867 (No. 686816) (exhibit A).

29. See *Quantum*, 105 So. 3d 867.

30. See *id.*

the open mine doctrine, and also cautions that, if followed, the court's flawed analysis will cause incorrect results in future cases.

I. LOUISIANA'S INSTITUTION OF FORCED HEIRSHIP, THE SURVIVING SPOUSE USUFRUCT, AND MINERAL CODE ARTICLE 190

In Louisiana, a person dies either testate or intestate.<sup>31</sup> Testate succession “results from the will of the deceased,”<sup>32</sup> and intestate succession “results from provisions of law in favor of certain persons, in default of testate successors.”<sup>33</sup> Historically, testators have been limited as to whom they could exclude from their will and the amount of their estate that they could bequeath due to Louisiana's concept of forced heirship.<sup>34</sup> In recent years, Louisiana has moved toward free testation by virtually abolishing forced heirship and by creating exceptions to the limited forced heirship regime that still exists, such as the creation of the surviving spouse usufruct.<sup>35</sup> Most importantly, this policy change allows the “intent of the testator [to] control,” which is at the core of testamentary interpretation in Louisiana.<sup>36</sup>

*A. Protecting the Heirs with Forced Heirship*

A person in Louisiana has the right to use, enjoy, and dispose of his property as he pleases with certain limits that are established by law.<sup>37</sup> One such limit is when certain descendants—forced heirs—are guaranteed a portion of the estate, called the forced portion.<sup>38</sup> Historically, Louisiana's doctrine of forced heirship was meant to provide support for the children of decedents by entitling them to a certain portion of their parents' estate.<sup>39</sup> Prior to 1995, all descendants of a decedent, regardless of age, were entitled to a portion of the decedent's estate.<sup>40</sup> However, in light of weakening familial ties and increased life expectancy, the desire for free testation increased so that a testator could do with his property as

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31. LA. CIV. CODE art. 873 (2015).

32. LA. CIV. CODE art. 874 (2015).

33. LA. CIV. CODE art. 875 (2015).

34. See LA. CIV. CODE art. 1494 (2015); KATHRYN LORIO, SUCCESSIONS AND DONATIONS § 10.1, in 10 LOUISIANA CIVIL LAW TREATISE 296 (2d ed. 2009).

35. See discussion *infra* Part I.B.

36. LA. CIV. CODE art. 1611 (2015).

37. See LA. CIV. CODE art. 477 (2015).

38. See LA. CIV. CODE art. 1494 (2015); LORIO, *supra* note 34, § 10.1, at 296.

39. LORIO, *supra* note 34, § 10.1, at 296.

40. See LA. CIV. CODE art. 1493 (1989).



he saw fit.<sup>41</sup> Thus in 1995, Article XII, Section 5, of the Louisiana Constitution was amended to abolish the concept of forced heirship, with two exceptions.<sup>42</sup>

First, descendants of the first degree who are, at the time of the decedent's death, 23 years old or younger are still forced heirs.<sup>43</sup> Second, descendants who are, or may be in the future, permanently incapable of taking care of their persons or administering their estates because of mental incapacity or physical infirmity also qualify as forced heirs.<sup>44</sup> Descendants who qualify under these two exceptions cannot be deprived of the "forced portion" of the decedent's estate.<sup>45</sup> The amount of the forced portion that is guaranteed to the forced heirs depends on the number of forced heirs.<sup>46</sup> The forced portion is a total of one-fourth of the estate when there is only one forced heir and a total of one-half of the estate when there are two or more forced heirs.<sup>47</sup> When a testator leaves forced heirs, but bequeaths a portion of his estate to others amounting to more than the law allows, the disposition is considered excessive.<sup>48</sup>

An excessive disposition is an impingement on the forced portion of the forced heirs and although it is not null,<sup>49</sup> forced heirs may demand that the excessive disposition be reduced to the extent necessary to eliminate the impingement.<sup>50</sup> Therefore, forced heirs have the power to demand that excessive donations be reduced so that they may receive the portion of the estate to which they are legally entitled.<sup>51</sup> However, some donations are not considered

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41. The Louisiana State Legislature began to favor free testation when it increased the disposable portion—the portion of the testator's estate that is freely disposable at the will of the testator—available to the surviving spouse and allowed for a lifetime usufruct over the portion that the descendants inherited. See Kathryn Lorio, *The Changing Concept of Family and Its Effect on Louisiana Succession Law*, 63 LA. L. REV. 1161, 1177–78 (2003).

42. See LORIO, *supra* note 34, § 10.1, at 297.

43. See LA. CONST. art. XII, § 5; LA. CIV. CODE art. 1493 (2015).

44. See LA. CONST. art. XII, § 5; LA. CIV. CODE art. 1493 (2015).

45. See LA. CIV. CODE art. 1494 (2015).

46. See LORIO, *supra* note 34, § 10.1, at 314–18.

47. LA. CIV. CODE art. 1495 (2015).

48. See LA. CIV. CODE art. 1503 (2015); see also LA. CIV. CODE art. 1499 (1989); A.N. Yiannopoulos, *Of Legal Usufruct, The Surviving Spouse, and Article 890 of the Louisiana Civil Code: Heyday For Estate Planning*, 49 LA. L. REV. 803, 824 (1989).

49. The legitime is the portion of the decedent's estate that is guaranteed to each forced heir. LA. CIV. CODE art. 1494 (2015).

50. See LA. CIV. CODE art. 1503 (2015); see also LA. CIV. CODE art. 1499 (1989).

51. LA. CIV. CODE art. 1503 (2015); see LORIO, *supra* note 34, § 10.5, at 318.

excessive and thus give the testator more freedom to dispose of his property without impinging on the legitime of the forced heirs.<sup>52</sup>

*B. The Surviving Spouse Usufruct as a Permissible Burden*

A usufruct is a real right of limited duration over the property of another.<sup>53</sup> It can be created by juridical act, either *inter vivos* or *mortis causa*, or by operation of law—a usufruct that arises by operation of law is legal, and a usufruct that is created by juridical act is a conventional usufruct.<sup>54</sup> A usufruct gives the usufructuary the *usus* and *fructus* over the thing subject to the usufruct; however, the forced heirs are entitled to the *abusus* over the thing.<sup>55</sup> This means that a forced heir does not enjoy the property during the usufruct because the usufructuary is entitled to all of the fruits.<sup>56</sup> Typically, a testator cannot grant a usufruct over the forced portion; such a bequest is an impermissible burden on the forced heir's legitime.<sup>57</sup> However, one major exception is the power of a testator to leave a legacy granting a usufruct to the surviving spouse.<sup>58</sup>

The usufruct in favor of the surviving spouse was originally a permissible burden on the forced heir's portion because it arose under intestacy and, therefore, by operation of law.<sup>59</sup> This was so that the surviving spouse could retain the family home and to ensure that the surviving spouse had sufficient resources to take care of herself and the surviving children.<sup>60</sup> Beginning in 1888 with *Succession of Moore*, courts have held that a testator may

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52. See LA. CIV. CODE art. 1499 (2015); LA. CIV. CODE art. 890 (1989). See LORIO, *supra* note 34, § 10.10, at 336 (“A couple of exceptions existed that permitted the imposition of usufruct on the *legitime*.”).

53. LA. CIV. CODE art. 535 (2015).

54. LA. CIV. CODE art. 544 (2015).

55. If the things subject to the usufruct are consumables, the usufructuary may consume, alienate, or encumber them. LA. CIV. CODE art. 538 (2015). If the things subject to the usufruct are nonconsumables, the usufructuary has the right to possess them and to derive the advantages that they produce, but with the obligation of preserving their substance. LA. CIV. CODE art. 539 (2015). The usufructuary is also entitled to the fruits of the thing subject to usufruct. LA. CIV. CODE art. 550 (2015).

56. See LA. CIV. CODE art. 550 (2015).

57. Louisiana Civil Code article 1496 states that “[n]o charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law, such as a usufruct in favor of a surviving spouse.” LA. CIV. CODE art. 1496 (2015).

58. See Cynthia A. Samuel, William M. Shaw, Jr. & Katherine S. Spaht, *What Has Become of Forced Heirship?*, 45 LA. L. REV. 575, 580 (1985).

59. See *Succession of Moore*, 4 So. 460 (La. 1888).

60. YIANNPOULOS, *supra* note 9, § 7.3, at 433. See generally *Moore*, 4 So. 460; *Hall v. Touissant*, 28 So. 304, 305 (La. 1900).

bequeath a usufruct to his surviving spouse.<sup>61</sup> In *Moore*, the testator bequeathed to his wife a testamentary lifetime usufruct over all of the property in his estate.<sup>62</sup> The Louisiana Supreme Court held that the testator had the ability to leave a legacy to a surviving spouse that includes full ownership of the disposable portion and a usufruct over the community property that formed part of the forced heir's legitime.<sup>63</sup> The Court reasoned that such a legacy was not an impingement on the forced heir's legitime because it was equivalent to a usufruct that arose under intestacy, which attached to community property by operation of law.<sup>64</sup> Thus, the provision in the testator's will that granted the usufruct was treated as a confirmation of a legal usufruct and, as such, attached to the testator's community property by operation of law instead of by the testator's will.<sup>65</sup>

Similarly, in *Winsberg v. Winsberg*, the testator bequeathed all of his property to his wife in full ownership and, subsequently, his children moved to reduce.<sup>66</sup> There was no mention of a usufruct in the decedent's will; however, citing *Moore*, the Court found that a legacy of full ownership was not adverse to a usufruct created by law in favor of the surviving spouse.<sup>67</sup> The Court stated that, in fact, the decedent intended to give his spouse more than the law allowed; thus, the decedent's surviving spouse was entitled to a usufruct over the community property.<sup>68</sup> Because the usufruct arose by operation of law and not by the juridical act of making the will, the usufruct did not impinge on the forced heir's legitime.<sup>69</sup>

Later, in *Succession of Chauvin*, the Supreme Court relied on the confirmation doctrine to determine the length of a usufruct that was confirmed by testament.<sup>70</sup> In *Chauvin*, the testator bequeathed his entire estate to his son but made the bequest subject to a usufruct in favor of his wife; however, the testament did not

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61. *Moore*, 4 So. at 461–64.

62. *Id.* at 461.

63. *Id.* at 464. See also *Succession of Chauvin*, 257 So. 2d 422 (La. 1972), overruled by statute, Act No. 77, 1996 La. Acts 1027.

64. *Moore*, 4 So. at 462.

65. See *Moore*, 4 So. at 463; YIANNPOULOS, *supra* note 9, § 7.8, at 449 (According to the jurisprudence and article 1916, "a testamentary disposition that was not adverse to the interests of the surviving spouse did not defeat the legal usufruct under that article. Such a disposition merely confirmed the legal usufruct.").

66. *Winsberg v. Winsberg*, 96 So. 2d 44, 45–46 (La. 1957).

67. *Id.* at 48.

68. *Id.*

69. *Id.* See also *Moore*, 4 So. 460.

70. *Succession of Chauvin*, 257 So. 2d 422 (La. 1972).

specify the length of the usufruct.<sup>71</sup> The Court held that the will “merely confirmed” the legal usufruct to the surviving spouse over all of the community property, and, because there was no indication in the will that the usufruct should be for life, the usufruct terminated upon death or remarriage.<sup>72</sup> *Chauvin* illustrates that courts frequently used the doctrine of confirmation to determine the length of a usufruct when the length was not stated in the will.<sup>73</sup>

A few years after *Chauvin*, the Court reaffirmed *Moore* and *Winsberg* in *Succession of Waldron*.<sup>74</sup> In *Waldron*, the testator bequeathed to his wife a usufruct for life over his entire estate, which consisted of only community property.<sup>75</sup> After the testator’s death, his daughter filed suit claiming that the usufruct was an impingement on her legitime.<sup>76</sup> In holding that a bequest consisting of all of the testator’s community property was not an adverse disposition to a legal usufruct, the Court noted that it must interpret the will in a way that furthers the testator’s intent.<sup>77</sup> Thus, the Court held that the spouse was entitled to a legal usufruct under former article 916, which meant that the spouse was entitled to a usufruct over the community property until remarriage.<sup>78</sup> Again, because the usufruct was created by operation of law, it did not impinge on the forced heir’s legitime.<sup>79</sup>

In 1975, the same year *Waldron* was decided, the Louisiana Legislature amended Louisiana Civil Code article 916,<sup>80</sup> beginning the movement toward expanding the rights of Louisiana testators. The amendment of article 916 allowed a testator to grant, by testament, a lifetime usufruct over the forced portion without

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71. *Id.* at 422.

72. *Id.* at 426.

73. *Id.*

74. *Succession of Waldron*, 323 So. 2d 434, 438 (La. 1975).

75. *Id.* at 435.

76. *Id.*

77. *Id.* at 437–38.

78. *Id.* at 439.

79. *Id.* at 438. The predecessor to article 890, article 916, was the applicable law at the time of *Waldron*, but the analysis was the same.

80. An “unless” clause was added after the words “second marriage,” which stated:

Unless the usufruct has been confirmed for life or any other designated period to the survivor by the last will and testament of the predeceased husband or wife, and the rights of forced heirs to the legitime shall be subject to any such usufruct, which usufruct shall not be an impingement on the legitime.

Act No. 680, 1975 La. Acts 1477–78. See also YIANNPOULOS, *supra* note 9, § 7.8, at 449; Yiannopoulos, *supra* note 48, at 805–06.

impinging on it.<sup>81</sup> In 1979, the Legislature again expanded the rights of Louisiana testators by amending article 916 to allow a testator to grant a usufruct to the surviving spouse over separate property, which was to be treated as a legal usufruct such that it was not an impingement on the forced portion.<sup>82</sup> This amendment granted a testator even more freedom to dispose of his property by allowing him to grant a usufruct to his surviving spouse over both community and separate property.<sup>83</sup> Two years later, article 916 was repealed and replaced by Louisiana Civil Code article 890 in a legislative effort to overhaul the articles governing the surviving spouse usufruct.<sup>84</sup>

Article 890 encompassed the intestate legal surviving spouse usufruct and the testamentary surviving spouse usufruct, and it made clear that neither impinged on the forced portion.<sup>85</sup> A legal usufruct arose by operation of law in favor of the surviving spouse when the deceased died intestate with community property in his estate but also left descendants who qualified as forced heirs.<sup>86</sup> Because a legal usufruct arose by operation of law, not by testament, it did not impinge on the legitime of the forced heirs.<sup>87</sup> The testamentary surviving spouse usufruct, on the other hand, permitted the deceased to “by testament grant a usufruct for life or

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81. The availability of a usufruct for life also allowed the surviving spouse to take advantage of the tax benefit afforded by the marital deduction because a usufruct only qualified for the deduction if it was granted for life. *See* I.R.C. § 2056 (2012).

82. Act No. 678, 1979 La. Acts 1775 (“Further, a husband or wife may, by his or her last will and testament, grant a usufruct for life or any other designated period to the surviving spouse over so much of the separate property as may be inherited by issue of the marriage with the survivor, and the rights of forced heirs to the legitime shall be subject to any such usufruct, which usufruct thus granted shall be treated in the same fashion as a legal usufruct and not be an impingement upon the legitime.”).

83. *Id.*

84. LA. CIV. CODE art. 890 (1989).

85. Former article 890 provided in pertinent part:

If the deceased spouse is survived by descendants, and shall not have disposed by testament of his share in the community property, the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants. This usufruct terminates when the surviving spouse contracts another marriage, unless confirmed by testament for life or for a shorter period. The deceased may by testament grant a usufruct for life or for a shorter period to the surviving spouse over all or part of his separate property.

LA. CIV. CODE art. 890 (1989). *See also* Diane M. Lloyd, Comment, *New Hope for the Survivor: The Changes in the Usufruct of the Surviving Spouse*, 28 LOY. L. REV. 1095, 1101 (1982).

86. LA. CIV. CODE art. 890 (1989).

87. *See* Succession of Moore, 4 So. 460 (La. 1888).

for a shorter period to the surviving spouse over all or part of his separate property.”<sup>88</sup> The Legislature, in revising article 890, specifically stated that a testamentary surviving spouse usufruct “is to be treated as a legal usufruct and is not an impingement upon legitime.”<sup>89</sup> This provision was necessary to allow a testator greater freedom to dispose of his property because a testamentary usufruct over separate and community property in favor of the surviving spouse had historically been considered an impingement on the forced portion.<sup>90</sup>

The testamentary usufruct that was “treated as a legal usufruct” created a challenge for courts faced with the task of determining the qualities of usufructs that arose under article 890, such as the type of property that the usufruct could encompass or when the usufruct terminated.<sup>91</sup> For example, in *Morgan v. Leach*, the testatrix bequeathed all of her property to her husband, which resulted in a usufruct in favor of the surviving spouse due to the forced heir’s reduction of the legacy.<sup>92</sup> The Louisiana First Circuit Court of Appeal held that the usufruct was legal because under article 890 it was treated as a testamentary confirmation of a legal usufruct.<sup>93</sup> The court focused on the decedent’s testamentary intent and determined that the testatrix intended that her husband be given as much property as she was permitted to give him under the law.<sup>94</sup> Ultimately, the court stated that the surviving spouse was entitled to a lifetime usufruct over the entire forced portion but nonetheless classified the usufruct as legal, even though the usufruct did not terminate at remarriage as legal usufructs did.<sup>95</sup>

In 1996, the same year that *Morgan* was decided, the Louisiana Legislature revised the Civil Code’s succession articles in an effort to conform to the newly modified doctrine of forced heirship under the constitutional amendments of 1995, which abolished forced heirship except in cases of 23-year-old descendants and physically or mentally incapable descendants.<sup>96</sup> The 1996 amendment revised

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88. LA. CIV. CODE art. 890 (1989).

89. *Id.* See *Morgan v. Leach*, 680 So. 2d 1381, 1383 (La. Ct. App. 1996).

90. See *Moore*, 4 So. at 461–64.

91. See *Morgan*, 680 So. 2d 1381; *Succession of Waldron*, 323 So. 2d 434 (La. 1975). Note that *Waldron* was decided under former Civil Code article 916, which was the predecessor to article 890; however, the same issues were presented.

92. *Morgan*, 680 So. 2d at 1382–83.

93. *Id.* at 1383.

94. *Id.* at 1384.

95. *Id.* at 1384–85.

96. See *supra* Part I.A.

article 890 and enacted new article 1499.<sup>97</sup> The revision created separate articles for the traditional legal surviving spouse usufruct that arose under intestacy and the testamentary surviving spouse usufruct.<sup>98</sup> Under current law, article 890 solely governs legal usufructs that arise by operation of law.<sup>99</sup> The intestacy legal surviving spouse usufruct was not revised in substance; thus, because there was no change in the law for such a usufruct, it still does not impinge on the forced portion because it is created by operation of law.<sup>100</sup>

New article 1499 governs testamentary surviving spouse usufructs that were formerly governed by article 890 and states that “[t]he decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion.”<sup>101</sup> A usufruct under this article “is a permissible burden that does not impinge upon the legitime, whether it affects community property or separate property, whether it is for life or a shorter period, . . . and whether or not the usufructuary has the power to dispose of nonconsumables.”<sup>102</sup> There is no need to “treat” it as a legal usufruct because it is currently authorized by law.<sup>103</sup> Some scholars have argued that article 1499 legislatively overruled *Succession of Chauvin*<sup>104</sup> by stating that the usufruct shall be for life unless expressly designated for a shorter period.<sup>105</sup> In *Chauvin*, the Court held that a usufruct ended upon remarriage when a testator failed to specify the length of a testamentary usufruct.<sup>106</sup> Although this may be true, *Morgan* indicated that courts were starting to trend toward allowing the usufruct to last for life due to the deference that courts give to a testator’s intent.<sup>107</sup> Thus, new article 1499

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97. Kerry J. Miller, Comment, *The New Forced Heirship Law, Its Implementing Legislation, and Major Substantive Policy Changes of the Louisiana State Law Institute’s Proposed Comprehensive Revision of the Successions and Donations Laws*, 71 TUL. L. REV. 223, 239–42 (1996).

98. See LA. CIV. CODE art. 890 (2015); LA. CIV. CODE art. 1499 (2015).

99. New article 890 states that “[i]f the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent’s share of the community property to the extent that the decedent has not disposed of it by testament.” LA. CIV. CODE art. 890 (2015).

100. See *id.*

101. LA. CIV. CODE art. 1499 (2015).

102. *Id.*

103. See *supra* note 53.

104. *Succession of Chauvin*, 257 So. 2d 422 (La. 1972).

105. LA. CIV. CODE art. 1499 cmt. d (2015). See also Kathryn Venturatos Lorio, *Forced Heirship: The Citadel Has Fallen—Or Has It?*, 44 LA. B.J. 16, 18 (1996). But see YIANNPOULOS, *supra* note 9, § 7.8, at 450.

106. *Chauvin*, 257 So. 2d at 426.

107. See *Morgan v. Leach*, 680 So. 2d 1381, 1384–85 (La. Ct. App. 1996).

does not represent a profound shift in the law beyond what was already established by the jurisprudence.

*C. Louisiana Mineral Code Article 190: Expanded Rights for the Surviving Spouse*

Typically under the Louisiana Civil Code, a usufructuary has the right to all fruits, which “are things that are produced by or derived from another thing without diminution of its substance.”<sup>108</sup> Neither mineral substances extracted from the ground nor bonuses, delay rentals, or royalties are classified as fruits because they diminish the value of the land and are not “born and reborn of the soil.”<sup>109</sup>

By way of exception to this general rule, the Louisiana Supreme Court in *Gueno v. Medlenka* held that if there were open mines actually worked at the time the usufruct was created, the minerals and proceeds from mineral production would be treated as natural and civil fruits; thus, the usufructuary would be entitled to the mineral proceeds.<sup>110</sup> In contrast, the Court also held that products derived from mines that were not open at the time the usufruct was created “must be excluded, from the fruits and products to which the usufructuary is entitled”; thus, the usufructuary has no right to minerals produced from a mine that was not opened until after the usufruct was created.<sup>111</sup> This meant that the naked owner’s right to open new mines and reduce minerals to possession is unaffected by the subsequent creation of a usufruct.<sup>112</sup>

The exception created in *Gueno* was codified in 1974 when the Louisiana Legislature enacted the Mineral Code.<sup>113</sup> Louisiana Mineral Code article 190 allowed a usufructuary to enjoy the landowner’s rights in minerals according to the principles set forth in *Gueno*.<sup>114</sup> Prior to 1986, article 190 stated:

If a usufruct of land is that of a surviving spouse in community, that of parents during marriage, or any other legal usufruct, or if there is no provision including the use and

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108. LA. CIV. CODE arts. 550–551 (2015).

109. *Elder v. Ellerbe*, 66 So. 337, 338 (La. 1914). *See also* *Gueno v. Medlenka*, 117 So. 2d 817 (La. 1960).

110. *Gueno*, 117 So. 2d at 822.

111. *Id.* *See also* *King v. Buffington*, 126 So. 2d 326, 328–29 (La. 1961).

112. *See* LA. REV. STAT. ANN. § 31:195 (2000); YIANNPOULOS, *supra* note 9, § 2:18, at 147.

113. LA. CIV. CODE art. 561 (2015); LA. REV. STAT. ANN. § 31:190 (2000).

114. *See* LA. REV. STAT. ANN. § 31:190 (2000).



enjoyment of mineral rights in a conventional usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals as to mines or quarries actually worked at the time the usufruct was created.<sup>115</sup>

Thus, article 190 governed all usufructs, including surviving spouse usufructs, which were subject to Louisiana's open mine doctrine.<sup>116</sup> A usufructuary was entitled to the use and enjoyment of the minerals when there were "mines or quarries actually worked" at the time the usufruct was created.<sup>117</sup> This meant that all usufructaries, regardless of the classification, were entitled to the proceeds from mineral production only when minerals were being produced from the land at the time the usufruct was created.<sup>118</sup>

Subsequently, in 1986, the Legislature revised article 190 to expand the rights of the surviving spouse usufructuary.<sup>119</sup> The Legislature added a second paragraph to article 190, which separated surviving spouse usufructs from all other types of usufructs.<sup>120</sup> Currently, surviving spouse usufructs are governed by article 190(B), and all other usufructs that are not held by surviving spouses are governed by article 190(A).<sup>121</sup> Distinguishing usufructs in favor of surviving spouses is critically important because the open mine doctrine does not apply to usufructs in favor of surviving spouses.<sup>122</sup>

Article 190(A) is identical to pre-revision article 190, but it excludes surviving spouses; it affects usufructs of parents during marriage, other legal usufructs, and all conventional usufructs,

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115. LA. REV. STAT. ANN. § 31:190 (1975). *See Gueno*, 117 So. 2d at 822 (citing PLANIOL, in Vol. 1, No. 2794 TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL); *see also* Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 820 (1992) ("Louisiana does have an open mine doctrine that is an exception to the rule that the naked owner of land enjoys the present benefit of the minerals. The open mine doctrine is found in Articles 190 and 191 of the Mineral Code.").

116. *See* LA. REV. STAT. ANN. § 31:190 (1975).

117. *Id.*

118. LA. REV. STAT. ANN. § 31:191 (2000).

119. Act No. 245, 1986 La. Acts 540 ("To amend and reenact R.S. 31:190, relative to the rights of usufructuaries in minerals; to provide that the usufruct of land of the surviving spouse includes the use and enjoyment of the landowner's rights in minerals, whether or not mines or quarries were actually worked at the creation of the usufruct; and to provide for related matters."). Mineral Code article 190 was "designed to expand the benefits of a usufructuary." Patrick H. Martin, *Developments in the Law 1990-1991, Mineral Rights*, 52 LA. L. REV. 677, 697 (1992).

120. *See* Act No. 245, 1986 La. Acts 540.

121. *See* LA. REV. STAT. ANN. § 31:190 (2000).

122. *See id.*

including testamentary usufructs, that do not have provisions limiting the use and enjoyment of minerals.<sup>123</sup> All usufructs under article 190(A) are still subject to the open mine doctrine.<sup>124</sup> However, surviving spouse usufructs are currently governed by article 190(B), which states:

If a usufruct of land is that of a surviving spouse, whether legal or conventional, and there is no contrary provision in the instrument creating the usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals, whether or not mines or quarries were actually worked at the time the usufruct was created. However, the rights to which the usufructuary is thus entitled shall not include the right to execute a mineral lease without the consent of the naked owner.<sup>125</sup>

Thus, under article 190(B), surviving spouse usufructs, both legal and testamentary, are not subject to the open mine doctrine.<sup>126</sup> Instead, a surviving spouse usufructuary is entitled to the mineral rights—regardless of when the usufruct was created or whether the mine was open.<sup>127</sup> The Legislature expanded the rights of the surviving spouse usufruct because it ensures that a surviving spouse has sufficient support by always receiving the use and enjoyment of the landowner's rights in minerals.<sup>128</sup> Enjoyment of the landowner's rights in minerals means that the surviving spouse is entitled to mineral royalties irrespective of whether the mine was open at the time the usufruct was created. Thus, a surviving spouse usufructuary, whether legal or testamentary, will receive all of the proceeds that arise out of mineral production in all circumstances, regardless of when oil operations began or when the usufruct was created.<sup>129</sup>

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123. Section 31:190(A) states:

If a usufruct of land is that of parents during marriage, or any other legal usufruct, or if there is no provision including the use and enjoyment of mineral rights in a conventional usufruct, the usufructuary is entitled to the use and enjoyment of the landowners rights in minerals as to mines or quarries actually worked at the time the usufruct was created.

*Id.* § 31:190(A).

124. *Id.*

125. *Id.* § 31:190(B).

126. *Id.*

127. *Id.*

128. See YIANNPOULOS, *supra* note 9, § 2:21, at 155 (“This deviation from traditional principles is justified in light of the solicitude for the interests of the surviving spouse.”).

129. See LA. REV. STAT. ANN. § 31:190(B) (2000).

II. *QUANTUM RESOURCES V. PIRATE LAKE OIL*: A FLAWED ANALYSIS

In 2012, the Louisiana Fifth Circuit Court of Appeal was faced with a case that included issues of forced heirship, surviving spouse usufructs, and Louisiana Mineral Code article 190. The case was *Quantum Resources v. Pirate Lake Oil*, and the court had the task of determining how Louisiana succession law and Louisiana Mineral Code article 190 worked together.

On May 30, 1989, Elizabeth Jones died testate in Texas.<sup>130</sup> At the time of her death, the only property that Elizabeth owned in Louisiana was a tract of land (“the tract”) that she inherited from her father,<sup>131</sup> and that land was accordingly classified as her separate property under Louisiana law.<sup>132</sup> In her will, Elizabeth bequeathed all of her property, including the tract, to her husband, Allen Jones.<sup>133</sup> Although Elizabeth and Allen’s three children were excluded from her will, at the time of her death, her children were classified as forced heirs under Louisiana law.<sup>134</sup>

As forced heirs, the Jones children were entitled to claim the forced portion of their mother’s estate,<sup>135</sup> despite the fact that she omitted them from her will.<sup>136</sup> Several years after their mother’s death, the children initiated ancillary succession proceedings,<sup>137</sup>

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130. *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867, 869 (La. Ct. App. 2012). Under Louisiana law, “[t]estate succession results from the will of the deceased, contained in a testament executed in a form prescribed by law.” LA. CIV. CODE art. 874 (2015).

131. Original Brief on Behalf of Allen Kent Jones Appellant at 1, *Quantum*, 105 So. 3d 867 (La. Ct. App. 2012) (No. 12-CA-256).

132. Separate property includes “property acquired by a spouse by inheritance or donation to him individually.” LA. CIV. CODE art. 2341 (2015).

133. *Quantum*, 105 So. 3d at 869.

134. *Id.* Also, Louisiana Civil Code article 870(B) states, “[t]estate and intestate succession rights, including the right to claim as a forced heir, are governed by the law in effect on the date of the decedent’s death.” LA. CIV. CODE art. 870(B) (2015). At the time of Elizabeth Jones’s death, all descendants of a decedent were considered forced heirs. *See* LA. CIV. CODE art. 1493 (1989). In 1989, the Louisiana Legislature attempted to revise the forced heirship laws, but the Supreme Court in *Succession of Lauga*, 624 So. 2d 1156 (La. 1993), held that revision unconstitutional. Thus, the old forced heirship law should have governed.

135. Louisiana Civil Code article 1495 states that “[t]he portion reserved for the forced heirs is called the forced portion and the remainder is called the disposable portion.” LA. CIV. CODE art. 1495 (2015).

136. LA. CIV. CODE art. 1493 (1989) (“Donations *inter vivos* or *mortis causa* cannot exceed three-fourths of the property of the disposer, if he leaves, at his decease, one child; and one-half, if he leaves two or more children.”).

137. An ancillary succession proceeding may be opened when a deceased nonresident leaves property situated in Louisiana. *See* LA. CODE CIV. PROC. art. 3401 (2015).

demanding reduction of the disposition made to their father in the will.<sup>138</sup> In 1999, the trial court rendered a judgment of possession recognizing Allen as having full ownership of the disposable portion and recognizing the Jones children as naked owners of the forced portion, subject to a usufruct that terminated at death in favor of their father.<sup>139</sup>

In May 1996, prior to the institution of succession proceedings, Quantum Resources L.L.C. and Milagro Production L.L.C. began producing oil on the tract.<sup>140</sup> Unsure of who was entitled to the proceeds from the oil production, Quantum and Milagro later filed a concursus proceeding so that they would not be liable for paying the proceeds to the incorrect party.<sup>141</sup> Both Allen and the Jones children asserted claims for the royalties: Allen as usufructuary and the Jones children as naked owners.<sup>142</sup> As a result of the competing claims, the court was called upon to decide which party was entitled to the mineral royalties under Louisiana Mineral Code article 190.<sup>143</sup>

On appeal, the Louisiana Fifth Circuit, in deciding which party was entitled to the mineral proceeds, first found that the judgment of possession, a “juridical act,” created the usufruct.<sup>144</sup> The court therefore concluded that the inception of the usufruct was in 1999, when the judgment of possession was rendered.<sup>145</sup> Consequently,

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138. *Quantum*, 105 So. 3d at 869.

139. *Id.* In *Quantum*, the judgment of possession was not annulled, amended or modified. Original Brief on Behalf of Allen Kent Jones Appellant at 2, *Quantum*, 105 So. 3d 867 (La. Ct. App. 2012) (No. 12-CA-256). *See also* LA. CODE CIV. PROC. art. 3062 (2012) (“The judgment of possession rendered in a succession proceeding shall be prima facie evidence of the relationship to the deceased of the parties recognized therein, as heir, legatee, surviving spouse in community, or usufructuary, as the case may be, and of their right to the possession of the estate of the deceased.”). A naked owner is one who “enjoys prerogatives of ownership to the extent that they do not interfere with the enjoyment of the usufructuary. Accordingly, during the existence of the usufruct, the rights of the naked owner begin where the rights of the usufructuary end.” YIANNOPOULOS, *supra* note 9, § 5.3, at 341. *See also* LA. CIV. CODE art. 603 (2015) (“The naked owner may dispose of the naked ownership, but he cannot thereby affect the usufruct.”).

140. Original Brief on Behalf of Allen Kent Jones Appellant at 2–3, *Quantum*, 105 So. 3d 867 (La. Ct. App. 2012) (No. 12-CA-256).

141. *Quantum*, 105 So. 3d at 868. A concursus proceeding is “one in which two or more persons having competing or conflicting claims to money, property, or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding.” LA. CODE CIV. PROC. art. 4651 (2015).

142. *See Quantum*, 105 So. 3d at 869.

143. *See* LA. REV. STAT. ANN. § 31:190 (2000).

144. *Quantum*, 105 So. 3d at 873.

145. *Id.* at 873–74.

the court found that there were open mines at the time the usufruct was created, because oil production began in 1996, which was prior to the issuance of the judgment of possession.<sup>146</sup> The court next held that article 190(B) was inapplicable in this case.<sup>147</sup> Without stating reasons, the court found that Allen was a legatee of Elizabeth's will rather than a surviving spouse, even though Allen was, in fact, Elizabeth's surviving spouse. Therefore, the court held that Mineral Code article 190(B) did not apply.<sup>148</sup> Ultimately, the court applied Mineral Code article 190(A) and awarded the mineral proceeds to Allen because there were open mines when the usufruct was created, which meant that Allen as usufructuary was entitled to the mineral rights.<sup>149</sup> Although this outcome ultimately was correct, the court's analysis could lead to incorrect results by subjecting a surviving spouse usufruct to the open mine doctrine.

### III. A SCHOLARLY DEBATE: THE PROPER METHOD OF REDUCTION WHEN A TESTATOR BEQUEATHS ALL OF HIS PROPERTY IN FULL OWNERSHIP TO HIS SURVIVING SPOUSE

When an heir moves to reduce an excessive disposition in succession proceedings, an initial step is for the trial court to render a judgment of possession, which recognizes the relationship between the parties and sends the heirs and legatees into possession of the estate.<sup>150</sup> The correct method of reduction when a testator bequeaths all of his separate and community property to his surviving spouse was not discussed in *Quantum* because the court noted that it was not ripe for a decision; however, the question is of great importance because higher courts give great deference to judgments of possession until a party to the litigation questions the judgment in a nullity action.<sup>151</sup>

#### A. The Debate

Under current Louisiana law, it is clear that a testator has the freedom to grant a usufruct in favor of a surviving spouse over his separate and community property so that the surviving spouse receives the maximum amount of his estate allowed by law, even

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146. *Id.* at 874.

147. *Id.* at 873–74.

148. The court stated, “[h]e inherited full ownership of his deceased wife’s separate property as a legatee of his deceased wife, not as her surviving spouse.” *Id.* at 873.

149. *Id.* at 874. See also LA. REV. STAT. ANN. § 31:190(A) (2000).

150. LA. CODE CIV. PROC. art. 3061 (2015).

151. See, e.g., *Quantum*, 105 So. 3d at 869 n.2.

when the testator dies and is survived by forced heirs.<sup>152</sup> A question arises, however, as to the proper method of reduction when a decedent dies testate, bequeathing his separate and community property in full ownership to his surviving spouse but leaving forced heirs who are entitled to their forced portion. Because the forced heirs are entitled to demand reduction, the surviving spouse's bequest must be reduced at the request of the forced heirs in order to satisfy their forced portion.<sup>153</sup> Accordingly, it must be determined whether the surviving spouse is entitled to a usufruct over the forced portion at all and, if so, the proper classification of the usufruct. Under prior law, this was determined by the jurisprudence on the doctrine of confirmation.<sup>154</sup> Today, the answer depends on the proper interpretation of Louisiana Civil Code article 1503, which details the extent to which dispositions impinging upon the forced portion must be reduced.<sup>155</sup> The change in the law has sparked debate among legal scholars as to the extent of reduction that article 1503 requires.<sup>156</sup>

Under article 1503, "[a] donation . . . that impinges upon the legitime of a forced heir is not null but is merely reducible to the extent necessary to eliminate the impingement."<sup>157</sup> However, under current law, the extent of reduction that is necessary to eliminate the impingement is a point of debate. There are at least two competing scholarly views on the method of reduction that should be employed when a testator leaves all of his property to his surviving spouse.

The first approach, mentioned in the comments to article 1503, is based on a textual analysis of the reduction articles, in particular articles 1499 and 1503.<sup>158</sup> Article 1499 states that a usufruct bequeathed to a surviving spouse "is a permissible burden that does not impinge on the legitime, whether it affects community or separate property."<sup>159</sup> Further, article 1503 states, "[a] donation . . . that impinges upon the legitime of a forced heir is not null but is merely reducible to the extent necessary to eliminate the impingement."<sup>160</sup> Thus, article 1503 only requires the minimum

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152. LA. CIV. CODE art. 1499 (2015).

153. See LA. CIV. CODE art. 1503 (2015).

154. See discussion *supra* Part I.B; Succession of Chauvin, 257 So. 2d 422, 426 (La. 1972).

155. LA. CIV. CODE art. 1503 (2015).

156. LA. CIV. CODE art. 1503 (2015) (editor's notes).

157. LA. CIV. CODE art. 1503 (2015).

158. See LA. CIV. CODE art. 1499 (2015); LA. CIV. CODE art. 1503 (2015).

159. LA. CIV. CODE art. 1499 (2015).

160. LA. CIV. CODE art. 1503 (2015).

reduction that is sufficient to satisfy each forced heir's legitime.<sup>161</sup> Because a usufruct under article 1499 is a permissible burden and not an impingement on the legitime, the first scholarly approach advocates that a legacy in full ownership over all of the testator's property in favor of the surviving spouse should be reduced to a lifetime testamentary usufruct under article 1499 over both separate and community property with the power to dispose of nonconsumables.<sup>162</sup>

Accordingly, the usufruct will not terminate if the usufructuary remarries, as the legal usufruct does.<sup>163</sup> Also, with the power to dispose of nonconsumables, the usufructuary may lease, alienate, or encumber immovable property that is included in the testator's separate or community property.<sup>164</sup> This means that the surviving spouse can sell, lease, or take out a mortgage on immovable property, such as the family home. Also, at the option of the usufructuary, the usufruct of nonconsumables may be transformed into a usufruct of consumables.<sup>165</sup> This is accomplished when the surviving spouse sells a nonconsumable, such as the family home, and uses the cash from the sale, which is a consumable, for other purposes—although the surviving spouse is accountable for the money at the end of the usufruct.<sup>166</sup> Thus, the forced heirs are entitled to naked ownership of the forced portion, and the surviving spouse is entitled to a lifetime testamentary usufruct over the entire forced portion as well as full ownership of the disposable portion, which is the portion unaffected by the reduction.<sup>167</sup>

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161. *See id.*

162. "The right to dispose of a nonconsumable thing includes the rights to lease, alienate, and encumber the thing." LA. CIV. CODE art. 568 (2015). However, "[i]t does not include the right to alienate by donation inter vivos, unless that right is expressly granted." *Id.* *See also* LA. CIV. CODE art. 1499 (2015).

163. *Compare* LA. CIV. CODE art. 1499 (2015), *with* LA. CIV. CODE art. 890 (2015).

164. *See* LA. CIV. CODE art. 568 (2015).

165. *Heirs of Michel v. Knox*, 34 La. Ann. 399 (1882). *Compare* LA. CIV. CODE art. 538 (2015) ("If the things subject to the usufruct are consumables, the usufructuary becomes owner of them"), *with* LA. CIV. CODE art. 539 (2015) ("If the things subject to the usufruct are nonconsumables, the usufructuary has the right to possess them and to derive the utility, profits, and advantages that they may produce, under the obligation of preserving their substance.").

166. *See generally Knox*, 34 La. Ann. 399; *see also* LA. CIV. CODE art. 539 (2015) ("He is bound to use them as a prudent administrator and to deliver them to the naked owner at the termination of the usufruct.").

167. This approach is supported by comment (b) of article 1503. "[I]f the husband's will leaves all to his wife and there is a forced heir who is entitled to one-fourth, the legacy to the wife is reduced to the disposable portion in full ownership and a usufruct for life . . . over the forced portion, since that usufruct

Notably, this method of reduction was used under former article 890 in *Morgan v. Leach*.<sup>168</sup> In *Morgan*, the court, in determining what the testatrix meant by “the entirety of my estate in full ownership,” looked to her intent.<sup>169</sup> The court found that article 1502, the reduction article under previous law, only required reduction to the extent necessary to eliminate the impingement; thus, the surviving spouse received a lifetime usufruct over community and separate property.<sup>170</sup> Also, finding that it should interpret the will in a way that furthers the testatrix’s intent, the court found that because the testatrix bequeathed all of her property in full ownership to her surviving spouse, she intended to give her surviving spouse the maximum portion of her estate allowable by law.<sup>171</sup> Thus, the first scholarly approach appears to follow prior law on this issue.

The second scholarly approach, on the other hand, recognizes the possibility that the surviving spouse should receive a legal usufruct under article 890 over the forced portion under the doctrine of confirmation of a legal usufruct by testament.<sup>172</sup> This approach, which is set out in the editor’s notes, mentions *Winsberg v. Winsberg* to illustrate that the doctrine of confirmation of a legal usufruct was relied on under the prior law.<sup>173</sup> In *Winsberg*, the Court held that an excessive disposition in favor of a surviving spouse was a confirmation of a legal usufruct and that the usufruct over the forced portion in favor of the surviving spouse was not an impingement on the legitime.<sup>174</sup> However, in *Winsberg*, the surviving spouse only received a usufruct over the forced portion that consisted of community property, as legal usufructs under article 890 only attach to community property.<sup>175</sup>

Under the second approach, the forced heirs would receive full ownership of separate property included in the forced portion and

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could have been left to her expressly under Article 1499.” LA. CIV. CODE art. 1503 cmt. b (2015).

168. *Morgan v. Leach*, 680 So. 2d 1381, 1384 (La. Ct. App. 1996).

169. *Id.* at 1383–84.

170. *Id.* at 1384.

171. *Id.*

172. See LA. CIV. CODE art. 1503 (2015) (editor’s notes); see also *Morgan*, 680 So. 2d at 1383.

173. See LA. CIV. CODE art. 1503 (2015) (editor’s notes).

174. *Winsberg v. Winsberg*, 96 So. 2d 44, 47–48 (La. 1957); A.N. Yiannopoulos, *Testamentary Dispositions in Favor of the Surviving Spouse and the Legitime of Descendants*, 28 LA. L. REV. 509, 520 (1967).

175. See LA. CIV. CODE art. 1503 (2015) (editor’s notes); see also LA. CIV. CODE art. 890 (2015) (stating that legal usufructs only extend to community property).



naked ownership of the testator's share of community property included in the forced portion. The surviving spouse would receive full ownership of the disposable portion and a legal usufruct under article 890 over the forced portion, which means that the usufruct would only encompass community property.<sup>176</sup> Further, the surviving spouse would not be entitled to a usufruct over separate property that forms part of the forced portion, unlike in the textual approach.<sup>177</sup> Also, the usufruct would terminate upon remarriage instead of lasting for life.<sup>178</sup>

The debate over the proper method of reduction is of great importance to the usufructuary and the forced heirs because it determines what the usufruct encompasses and how long it will last. Thus, a solution to this debate will greatly help courts in deciding the qualities of a usufruct when a testator leaves all of his property to his surviving spouse in full ownership and the forced heirs exercise their right to reduce.

*B. The Solution: Usufruct for Life over Separate and Community Property with the Power to Dispose of Nonconsumables*

Considering that the intent of the testator controls the interpretation of his testament, the most effective way to solve the debate over the proper method of reduction is to use the approach that will conform best to the intent of the testator.<sup>179</sup> The method of reduction that should be used when a testator bequeaths all of his property to his surviving spouse is to reduce the excessive legacy to a usufruct under article 1499—a usufruct for life over separate and community property with the power to dispose of

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176. A legal usufruct in favor of a surviving spouse terminates upon remarriage or death, whichever occurs first. LA. CIV. CODE art. 890 (2015).

177. Compare LA. CIV. CODE art. 890 (2015), with LA. CIV. CODE art. 1499 (2015).

178. See LA. CIV. CODE art. 890 (2015). Professor Yiannopoulos also stated that there is possibly a third approach to reduction. He stated that “if it were maintained that the doctrine of confirmation has been suppressed in the 1996 revision, the surviving spouse should merely receive the disposable portion in full ownership.” See LA. CIV. CODE art. 1503 (2015) (editor’s notes). However, as Professor Yiannopoulos observed, “[o]ne may seriously doubt, however, that the doctrine of confirmation of the legal usufruct by will, established by Louisiana *jurisprudence constante* commencing with the Succession of Moore has been overruled legislatively by a comment which is neither law nor source of law.” *Id.* Thus, due to the long line of Louisiana cases that all relied on the doctrine of confirmation, it is unlikely that the entire doctrine of confirmation is no longer valid.

179. See *Morgan v. Leach*, 680 So. 2d 1381, 1384 (La. Ct. App. 1996); *Succession of Waldron*, 323 So. 2d 434, 438 (La. 1975).

nonconsumables.<sup>180</sup> The Louisiana Civil Code requires that a testament be interpreted in a way that furthers, rather than frustrates, the testator's intent.<sup>181</sup> Accordingly, it is only proper to give the surviving spouse as close as possible to what the testator intended.<sup>182</sup> When a testator leaves all of his property to his spouse in full ownership, he obviously intended to give his spouse the most that he was allowed to bequeath by law. However, if forced heirs are entitled to a portion of his estate, he is unable to give his surviving spouse everything that he owns in full ownership.<sup>183</sup> Under article 1499, the maximum amount of property that a testator can bequeath to his surviving spouse is full ownership of the disposable portion and a usufruct over community and separate property that terminates upon the death of the usufructuary.<sup>184</sup>

Given the importance of upholding the testator's intent in Louisiana succession law, a usufruct under article 1499 leads to a better result than a legal usufruct under article 890 that only encompasses community property. First, a usufruct for life is more beneficial to the surviving spouse because the usufruct will not terminate unless the surviving spouse dies,<sup>185</sup> whereas a legal usufruct terminates if and when the surviving spouse remarries.<sup>186</sup> This interpretation ensures that, even if the surviving spouse remarries, she will have enough support to take care of herself and the surviving children. Notably, the court in *Morgan* held that a usufruct, which arose from a bequest of all of the testator's property in full ownership, was for life, especially when it was clear that the testator intended to give the spouse the maximum permitted under law.<sup>187</sup>

Second, a testamentary usufruct under article 1499 encompasses separate and community property,<sup>188</sup> whereas a legal usufruct under article 890 only attaches to community property.<sup>189</sup> Granting the surviving spouse a usufruct that encompasses separate and

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180. LA. CIV. CODE art. 1499 (2015).

181. LA. CIV. CODE art. 1611 (2015).

182. See *id.*; Succession of Mydland, 653 So. 2d 8, 11–12 (La. Ct. App. 1995).

183. See LA. CIV. CODE art. 1494 (2015).

184. See LA. CIV. CODE art. 1499 (2015); LA. CIV. CODE art. 1503 (2015).

185. See LA. CIV. CODE art. 1499 (2015) (stating that a usufruct under this article is for life, unless there is a contrary provision in the testament).

186. See LA. CIV. CODE art. 890 (2015) (stating that the usufruct ends upon remarriage).

187. *Morgan v. Leach*, 680 So. 2d 1381, 1385 (La. Ct. App. 1996).

188. See LA. CIV. CODE art. 1499 (2015) (stating that the testator may grant a usufruct over separate and community property).

189. See LA. CIV. CODE art. 890 (2015) (stating that a legal usufruct will be only over community property).

community property allows the surviving spouse to have the use and enjoyment of all the testator's property, regardless of the type of property. Allowing the usufruct to encompass a larger portion of the testator's property, rather than limiting the usufruct to community property, ensures a greater likelihood that the surviving spouse has sufficient support and that the usufruct better conforms to the testator's intent.<sup>190</sup>

The surviving spouse will also have the power to dispose of nonconsumables under an article 1499 usufruct.<sup>191</sup> This means that the usufructuary has the power to lease, alienate, and encumber immovable things, such as the family home, without the consent of the forced heirs.<sup>192</sup> A legal usufruct under article 890 does not have the right to dispose of nonconsumables because the usufruct is created by operation of law, and this right may only be granted by express disposition.<sup>193</sup> However, under article 1499, a testator may grant the power to dispose of nonconsumables; thus, since the law allows the testator to grant the surviving spouse this right, the usufructuary is entitled to dispose of nonconsumables so that she may receive the maximum amount of property that the law allows.<sup>194</sup>

A usufruct under article 1499 also conforms to the policy changes driving the 1996 revision because Louisiana is moving away from favoring forced heirs and currently allows a testator more freedom to bequeath his property to whomever he wants. When a testator bequeaths all of his property to his surviving spouse, the testator most likely intended to give his surviving spouse as much as the law allows, and a usufruct under article 1499 grants the most support to the surviving spouse.<sup>195</sup> It also furthers another purpose of the 1996 revision, which was "to present the rules in a coherent framework that should be practical and workable."<sup>196</sup> This method of reduction is more practical and workable than the approach that employs the doctrine of confirmation because it is based on a simple textual analysis of articles 1499 and 1503, which are easily applied to an excessive donation. The method of reduction that grants a legal usufruct under article 890 is based on the jurisprudential doctrine of

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190. LA. CIV. CODE art. 1499 (2015).

191. *See id.*

192. *See* LA. CIV. CODE art. 568 (2015); *see also* Heirs of Michel v. Knox, 34 La. Ann. 399 (1882).

193. *See* LA. CIV. CODE art. 568 (2015).

194. *See* LA. CIV. CODE art. 1499 (2015).

195. *See* LORIO, *supra* note 34, § 10.1, at 1177–78.

196. Act No. 77, 1996 La. Acts 1016 (introductory note).

confirmation, the validity of which has been questioned.<sup>197</sup> Thus, in deciding judgments of possession when an excessive legacy is left in full ownership in favor of a surviving spouse and a forced heir moves to reduce the excessive disposition, courts should reduce the legacy to a usufruct under article 1499—a usufruct for life over separate and community property with the power to dispose of nonconsumables.<sup>198</sup>

### C. Application to Quantum

In *Quantum*, the court was not faced with the question of the method of reduction when a testator leaves his entire estate in full ownership to the surviving spouse; however, a few years after their mother's death, the Jones children moved to reduce the excessive legacy in favor of their father in order to satisfy their forced portion.<sup>199</sup> The 24th Judicial District Court issued a judgment of possession recognizing Allen as the universal legatee of his wife and the Jones children as forced heirs who were entitled to reduce their father's legacy.<sup>200</sup> Ultimately, the trial court found that Allen was entitled to full ownership of the disposable portion of Elizabeth's estate and to a lifetime usufruct over the forced portion, which consisted entirely of separate property.<sup>201</sup> Subsequently, the forced heirs filed a petition for annulment,<sup>202</sup> which attacked the judgment of possession alleging that, *inter alia*, a lifetime usufruct over the entire estate impinged on their individual legitimes.<sup>203</sup> The trial court had not ruled on the annulment matter at the time the Louisiana Fifth Circuit Court of Appeal decided *Quantum*. The Fifth Circuit found that the judgment of possession was valid and final and did not issue an opinion on the annulment matter.<sup>204</sup>

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197. See discussion *supra* Part III.A.

198. See LA. CIV. CODE art. 1499 (2015).

199. *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867, 873 (La. Ct. App. 2012).

200. *Id.* at 869.

201. *Id.* at 869–70.

202. Article 2004 of the Louisiana Code of Civil Procedure states that “a final judgment obtained by fraud or ill practices may be annulled.” LA. CODE CIV. PROC. art. 2004 (2015).

203. *Quantum*, 105 So. 3d at 869.

204. The *Quantum* court addressed the annulment matter in a footnote, stating:

In September of 2010, Jennifer Jones and her brother, Patrick Jones, filed a separate proceeding in the 24th Judicial District Court entitled “Petition for Annulment of Judgment Obtained by Fraud and Ill Practices,” Docket No. 692–379 (they were not joined by their sister Jacqueline, who appears in other pleadings in this record aligned with

The *Quantum* court missed an opportunity to discuss the proper method of reduction when there is an excessive legacy in full ownership of the entire estate in favor of the surviving spouse. Luckily for the parties involved, the 24th Judicial District Court used the method of reduction that conforms best to the intent of the testator by recognizing Allen as the full owner of the disposable portion with a lifetime usufruct over the entire forced portion, which included solely separate property.<sup>205</sup> Thus, when reducing excessive legacies, trial courts must use the method of reduction that is most faithful to the testator's intent, which, as the trial court properly held in this case, is full ownership of the disposable portion and a lifetime usufruct over the entire estate in favor of the surviving spouse.<sup>206</sup>

#### IV. *QUANTUM* AND MINERAL CODE ARTICLE 190: THE IMPORTANCE OF PROPERLY CLASSIFYING A USUFRUCT

The *Quantum* court was next faced with classifying the usufruct and applying that classification to Mineral Code article 190. According to the Louisiana Mineral Code, a usufruct of land does not typically include the landowner's rights in minerals.<sup>207</sup> However, Mineral Code article 190 specifies two exceptions to the general rule that apply to usufructs.<sup>208</sup> Usufructs in favor of surviving spouses, whether classified as legal or conventional, are entitled to the mineral rights regardless of whether there were open mines at the time the usufruct was created.<sup>209</sup> All usufructs that are

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Mr. Jones). Therein, they attack the Judgment of Possession rendered in the ancillary succession proceeding, contending that they had no knowledge of the ancillary succession proceeding, despite the fact that the matter was filed on their behalf, denying the validity of their signatures on those pleadings. They also argued that it was a conflict of interest for the same counsel to represent them and their father, one that they did not waive. Another part of the petition asserted that awarding them naked ownership subject to Mr. Jones' usufruct rather than full ownership of the forced portion impinged upon their legitimate. As of the date of the issuance of this opinion, there has been no judgment in the annulment matter. Thus, the Judgment of Possession rendered in the Ancillary Succession remains valid and final at this time. We express no opinion in the annulment matter or how a nullity judgment in that suit might affect the instant matter.

*Quantum*, 105 So. 3d at 869 n.2.

205. *Id.* at 873.

206. *Id.* at 869–70.

207. *See* LA. REV. STAT. ANN. § 31:188 (2000).

208. *Id.* § 31:190.

209. *Id.* § 31:190(B).

held by persons other than surviving spouses are subject to the open mine doctrine and are not entitled to the mineral rights if drilling operations began prior to the creation of the usufruct.<sup>210</sup> Thus, in order to correctly apply Mineral Code article 190, it is important to determine the usufruct's classification and if the usufruct is in favor of a surviving spouse.<sup>211</sup>

*A. Classifying a Usufruct That Is Reduced from Full Ownership Under Current Law*

When a testator bequeaths more of his property than the law allows to someone other than the forced heirs, and the forced heirs later reduce the excessive disposition, the usufruct must be classified as legal or conventional to determine the qualities of the usufruct. One may think, as the Louisiana Fifth Circuit in *Quantum* thought, that an excessive disposition in full ownership creates a conventional usufruct that is created by a juridical act—the judgment of possession.<sup>212</sup> The Fifth Circuit argued that the forced heir's right to reduce is optional; thus, if the forced heirs did not exercise their right to reduce, the universal legatee would retain full ownership over all of the community and separate property.<sup>213</sup> Under this view, the judgment of possession created the usufruct because if the trial court had not made a judicial determination of reduction there would be no usufruct.<sup>214</sup> The usufruct would therefore be classified as conventional because it was created by a juridical act—although the result is correct, the reasoning is seriously flawed.<sup>215</sup>

It is well settled that judgments of possession do not create rights;<sup>216</sup> legatees and heirs' rights arise from a testator's will or by operation of law, not a judgment of possession.<sup>217</sup> A judgment of possession simply recognizes the rights to which legatees and heirs are entitled and sends the parties into possession of the property.<sup>218</sup>

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210. *Id.* § 31:190(A).

211. *See* discussion *supra* Part I.C.

212. *Quantum Res. Mgmt.v. Pirate Lake Oil Corp.*, 105 So. 3d 867, 873 (La. Ct. App. 2012).

213. *Id.*

214. *See id.*

215. LA. CIV. CODE art. 544 (2015).

216. "In a judgment of possession, an heir '*acquires nothing* . . . that was not already his by operation of law.'" Scalise, Jr., *supra* note 13, at 434 (citations omitted).

217. *See Dalton v. Wickliffe*, 35 La. Ann. 355, 359 (1883) ("We are bound to find his rights, if they exist, in the will and not in an *ex parte* order of a court.").

218. *See Succession of Prutzman*, 209 So. 2d 303, 306 (La. Ct. App. 1968) (citing former Louisiana Code of Civil Procedure article 3062).

Louisiana Code of Civil Procedure article 3061 explicitly states that a judgment of possession “shall recognize” the relationship between the petitioner and the deceased.<sup>219</sup> Further, Louisiana Code of Civil Procedure article 3062 provides that a judgment of possession is prima facie evidence of the relationship of the parties to the deceased recognized in the judgment.<sup>220</sup> Articles 3061 and 3062 illustrate the well-settled fact that a judgment of possession merely recognizes rights—it does not create rights.<sup>221</sup>

A forced heir’s optional right of reduction does not have any legal impact on the fact that a judgment of possession does not confer rights. Although it is true that an heir or legatee would not have a usufruct if the forced heirs did not exercise their right of reduction, the judgment of possession still does not create any rights.<sup>222</sup> Accordingly, the Louisiana Fifth Circuit’s view in *Quantum* that the judgment of possession *created* the usufruct is faulty because it is impossible for a judgment of possession to create rights.<sup>223</sup>

Under current law, the proper classification for such a usufruct—one recognized by a judgment of possession from an excessive disposition in full ownership—is a conventional usufruct. This type of usufruct is created by a decedent’s testament—a juridical act—and can be classified as conventional or “testamentary.”<sup>224</sup> The usufruct arises out of the testator’s will because the testator’s bequest in full ownership is reduced to an amount that is sufficient to satisfy the forced portion.<sup>225</sup> The bequest in full ownership includes the *usus*, *fructus*, and *abusus*.<sup>226</sup> After reduction, the forced heirs become the naked owners, which includes the right of *abusus*, and the usufructuary is left with the *usus* and *fructus*.<sup>227</sup> Thus, the usufruct is the remnant of the testator’s bequest in full ownership after the forced heirs exercise their right of reduction and the legitime is satisfied.

It is essential not only to classify the usufruct, but also to correctly identify the source of the usufruct in order to determine when the usufruct arises. One may also think, as did the *Quantum*

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219. LA. CODE CIV. PROC. art. 3061 (2015).

220. See LA. CODE CIV. PROC. art. 3062 (2015); *Taylor v. Williams*, 110 So. 100, 101 (La. 1926).

221. See LA. CODE CIV. PROC. arts. 3061–3062 (2015).

222. See *id.*

223. See Scalise, Jr., *supra* note 13, at 434.

224. See LA. CIV. CODE art. 874 (2015).

225. See *Dalton v. Wickliffe*, 35 La. Ann. 355, 359 (1883); LA. CIV. CODE art. 1503 (2015).

226. See *supra* note 50.

227. See *supra* note 56.

court, that the judgment of possession created the usufruct, and thus the usufruct arose when the judgment of possession was rendered.<sup>228</sup> However, this ignores the fact that the “[s]uccession occurs at the death of a person,”<sup>229</sup> and Louisiana’s concept of seizin, which invests heirs with the ability to exercise possession over the estate at the death of the decedent.<sup>230</sup> After identifying the correct source of the usufruct—the testator’s will rather than the judgment of possession—there is but one logical point in time at which the usufruct could arise—at the death of the decedent.<sup>231</sup> Because the successor is vested with the decedent’s entire estate at death by the bequest in full ownership, the fact that the judgment of possession later recognized that the forced heirs, as naked owners, were entitled to the *abusus* does not cause the usufruct to arise when the judgment of possession was granted. Further, holding that the usufruct is created when the judgment of possession is rendered also creates uncertainty and confusion because judgments of possession can be changed or annulled,<sup>232</sup> whereas the date of the death of the decedent can never be changed.

Next, it must be determined whether the usufruct is in favor of a surviving spouse. If the usufruct is in favor of a surviving spouse, then the usufruct will not be subject to the open mine doctrine, and the usufructuary will receive the mineral rights regardless of when the usufruct was created.<sup>233</sup> One may argue, as the Louisiana Fifth Circuit argued in *Quantum*, that even though the usufructuary was the decedent’s surviving spouse, the spouse was not a surviving spouse within the meaning of the Mineral Code because the spouse inherited the decedent’s property as the legatee of the will—not as the surviving spouse.<sup>234</sup> Ultimately, this leads to the conclusion that the usufruct is conventional and is not in favor of a surviving spouse; thus, Mineral Code article 190(A) must be applied instead of article 190(B).

This view is also flawed because if a spouse is, in fact, the surviving spouse, then the spouse should also be a surviving spouse under the Mineral Code. Mineral Code article 190 was separated into two articles in order to provide that all successors who were surviving spouses would not be subject to the open mine

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228. *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867, 873 (La. Ct. App. 2012).

229. LA. CIV. CODE art. 934 (2015).

230. LA. CIV. CODE art. 935 (2015).

231. *See* LA. CIV. CODE art. 934 (2015).

232. *See* LA. CODE CIV. PROC. art. 2004 (2015).

233. LA. REV. STAT. ANN. § 31:190 (2000).

234. *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867, 873 (La. Ct. App. 2012).



doctrine.<sup>235</sup> Therefore, if a spouse who is, in fact, a surviving spouse is not considered a surviving spouse under the Mineral Code, then the revision and article 190(B) would be simply surplusage and would be rendered meaningless.<sup>236</sup> There is also no support in the Mineral Code for the court's proposition that a true surviving spouse should be treated as a legatee of the decedent's will.<sup>237</sup>

Accordingly, a true surviving spouse should be correctly classified as a surviving spouse for purposes of the Mineral Code; thus, because the usufruct is that of a surviving spouse, Mineral Code article 190(B) should apply. Under article 190(B), the usufruct is not subject to the open mine doctrine, which means that the surviving spouse receives the mineral rights regardless of when the usufruct was created or when drilling operations began.<sup>238</sup> This result also best conforms to the testator's intent because the surviving spouse will receive the mineral rights, which will provide more support for the surviving spouse. It is also consistent with the intent behind the creation of Mineral Code article 190(B) because it expands the rights of the usufructuary.<sup>239</sup>

Even though the usufructuary is entitled to the mineral rights, the forced heirs are not without hope. Generally, under Mineral Code article 192, a usufructuary has the right to grant mineral leases as long as the land is not burdened with an ongoing lease.<sup>240</sup> However, under article 190(B), a surviving spouse usufruct does not include the right to execute a mineral lease without the consent of the naked owners.<sup>241</sup> Thus, the forced heirs have the power to grant mineral leases on the property, which entitles them to retain bonuses and rental payments.<sup>242</sup>

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235. See Martin & Yeates, *supra* note 115, at 820.

236. See Black v. St. Tammany Parish Hosp., 25 So. 3d 711, 718 (La. 2009).

237. See YIANNPOULOS, *supra* note 9, § 2:21, at 155 n.4.

238. See LA. REV. STAT. ANN. § 31:190(B) (2000).

239. See Martin & Yeates, *supra* note 115, at 820 ("When originally enacted they provided very strictly that the usufructuary of land could enjoy the minerals only on mines actually worked at the time the usufruct came into existence. This meant that the pool actually had to be penetrated and shown by surface test to be capable of production in paying quantities. In 1986 the legislature modified the operation of the open mine doctrine to provide that the usufruct of the surviving spouse will enjoy the rights to minerals whether or not there is an actual working of a mine at the time the usufruct comes into existence.").

240. See LA. REV. STAT. ANN. § 31:192 (2000).

241. *Id.* § 31:190(B).

242. See *id.* § 31:105 (explaining that the nature of an executive right includes the right to grant leases). A bonus is "money or other property given for the execution of a mineral lease." *Id.* § 31:213(1). Rental means "money or other property given to maintain a mineral lease in the absence of drilling or mining operations or production of minerals." *Id.* § 31:213(4).

*B. Application to Quantum: Old Law Controls*

The *Quantum* court's first mistake was in applying current succession law when classifying Allen's usufruct, even though the decedent died in 1989—before the new law took effect.<sup>243</sup> According to Louisiana Civil Code article 870(B), the law in effect on the date of the decedent's death governs succession rights.<sup>244</sup> This incorrect application is evidenced by the court's citation to current article 890 instead of former article 890.<sup>245</sup> Thus, the court should have looked to the law applicable in 1989 to properly analyze the case.

The *Quantum* court should have applied the applicable law at the time of the decedent's death, just as the court did in *Morgan v. Leach*.<sup>246</sup> In *Morgan*, the decedent died in 1994 and bequeathed her entire estate in full ownership to her husband.<sup>247</sup> Her children, who met the qualifications to be forced heirs, exercised their right to reduce the excessive disposition.<sup>248</sup> The court in *Morgan* held that all usufructs established under former article 890 were "treated" as legal usufructs, and "unless there is an adverse testamentary disposition, the surviving spouse inherits, by operation of law, a usufruct of the estate to the extent permitted by Article 890."<sup>249</sup> The court noted that a bequest to a spouse of more than the law allows is not an adverse disposition and treated the excessive disposition as a confirmation of a legal usufruct.<sup>250</sup> Ultimately, the *Morgan* court held that the surviving spouse was entitled to a legal usufruct under former article 890.<sup>251</sup>

Just as in *Morgan*, the testatrix in *Quantum* died before the 1996 revision,<sup>252</sup> thus, the same law that the court used in *Morgan* should have been applied in *Quantum*. The testatrix in *Quantum* also bequeathed an excessive disposition to her husband in full

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243. *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867, 869 (La. Ct. App. 2012).

244. LA. CIV. CODE art. 870 (2015).

245. *Quantum*, 105 So. 3d at 873.

246. *Morgan v. Leach*, 680 So. 2d 1381, 1383 (La. Ct. App. 1996).

247. *Id.* at 1382.

248. *Id.*

249. *Id.* at 1383 (citing *Succession of Waldron*, 323 So. 2d 434, 437 (La. 1975)).

250. *See Succession of Waldron*, 323 So. 2d 434, 437 (La. 1975); *Winsberg v. Winsberg*, 96 So. 2d 44, 48 (La. 1957); *Morgan*, 680 So. 2d at 1383.

251. Former article 890 encompassed legal and testamentary surviving spouse usufruct. *See Morgan*, 680 So. 2d at 1383.

252. *Quantum Res. Mgmt. v. Pirate Lake Oil Corp.*, 105 So. 3d 867, 869 (La. Ct. App. 2012).

ownership, but she also had forced heirs.<sup>253</sup> As in *Morgan*, the *Quantum* court should have applied former article 890. Under this reasoning, the excessive disposition in favor of Allen would not constitute an adverse testamentary disposition to an article 890 usufruct.<sup>254</sup> Thus, the proper classification for Allen's usufruct under prior law was a legal surviving spouse usufruct.<sup>255</sup>

In applying the incorrect law to the facts of *Quantum*, the court also misapplied Mineral Code article 190. The court held that Mineral Code article 190(B) did not apply to the case because, based on its classification of Allen's usufruct, he was not a surviving spouse under article 190.<sup>256</sup> It instead found that article 190(A) was applicable to this case because the usufruct was classified as conventional.<sup>257</sup> Thus, the *Quantum* court held that Allen was entitled to the use and enjoyment of the mineral rights because there was an open mine at the time the usufruct was created—mineral production began in 1996, and the usufruct was created in 1999.<sup>258</sup>

However, under prior law, Allen should have received a usufruct that was "treated" as a legal surviving spouse usufruct even though it resulted from the testatrix's will.<sup>259</sup> Although the judgment of possession did not specifically state that the usufruct was that of a surviving spouse, the court should have applied article 190(B) because the usufruct was that of a surviving spouse.<sup>260</sup> Under article 190(B), Allen, as a surviving spouse under the Mineral Code, should have been entitled to the use and enjoyment of the mineral rights regardless of the existence of open mines or the date of inception of the usufruct. This means that the dates the usufruct and drilling operations commenced were actually irrelevant. Thus, even though the court ultimately held that Allen was entitled to the mineral rights because the usufruct was created before there were open mines, the court applied the current law to reach that result, when it should have applied the pre-revision law.

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253. *Id.*

254. *See Morgan*, 680 So. 2d at 1383.

255. *See id.*

256. *Quantum*, 105 So. 3d at 874.

257. *Id.*

258. *Id.*

259. *See Morgan*, 680 So. 2d at 1383.

260. *See* LA. REV. STAT. ANN. § 31:190(B) (2000).

## CONCLUSION

The court's analysis in *Quantum Resources v. Pirate Lake Oil* illustrates the importance of properly classifying a usufruct, specifically a usufruct that arises from a bequest in full ownership in favor of the surviving spouse that is reduced by the forced heirs. A case with facts similar to *Quantum* will come before Louisiana courts again, and large sums of money will be on the line. With the ongoing policy changes in Louisiana and the increasing demand for free testation, Louisiana courts must interpret wills in a way that furthers the testator's intent. Allen Jones was lucky that drilling operations began before the judgment of possession, because, if not, he would have been deprived of money that was rightfully his. Future surviving spouses might not be so fortunate and might be deprived of their property if the *Quantum* analysis is followed. Instead, when there is a surviving spouse, courts must apply Mineral Code article 190(B), meaning that the surviving spouse will receive the mineral rights regardless of the open mine doctrine.

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